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WESTERN DISTRICT OF WASHINGTON
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Sub ISSU

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GRISOFT, S.R.O.,

Requester,

v.

MICROSOFT CORPORATION; THE MICROSOFT NETWORK, LLC; MSNBC INTERACTIVE NEW, LLC;. MSBET, LLC; LINKEXCHANGE, INC.; WEBTV NETWORKS, INC.,

Witness.

Case No. MS07 165JLR

REQUEST FOR SUBPOENA

TO THE CLERK OF THE COURT:

Kindly accept this request of Grisoft, s.r.o. ("Requester"), by its attorneys, for the issuance of a subpoena *duces tecum* directed to Microsoft Corporation, The Microsoft Network, LLC, MSNBC Interactive News, LLC, MSBET, LLC, LinkExchange, Inc., WebTV Networks, Inc. ("the Witness"), pursuant to the Digital Millennium Copyright Act, specifically as codified in 17 U.S.C. § 512(h).

Accompanying this request in accordance with the Act are:

1. An excerpt of the provision from the Copyright code (17 U.S.C. § 512(h)) that authorizes the Clerk to issue a subpoena in the circumstances here present. The excerpt is attached hereto as Exhibit A.

KIPLING LAW GROUP PLLC
3601 FREMONT AVE N, SUITE 414
SEATTLE, WASHINGTON 98103
telephone (206) 545-0345
fax (206) 545-0350

Dockets.Justia.com

2. A copy of the letter of Julia Mattis, as attorney for Requester, demanding that the Witness, as Internet Service Provider to the offending party, "take down" all links to the latter's Website, under 17 U.S.C. § 512(c)(3)(A). The copy is attached hereto as Exhibit B.

3. The proposed subpoena to be issued in response to this request. The proposed subpoena is attached hereto as Exhibit C.

4. The declaration of Michael E. Kipling, as attorney for the Requester, also supplied in accordance with the Act. Counsel's declaration is attached hereto as Exhibit D.

WHEREFORE, Requester respectfully prays that the Clerk duly endorse and issue the proposed subpoena.

DATED this 14 day of December, 2007.

Michael E. Kipling, WSBA #7677
KIPLING LAW GROUP PLLC
3601 Fremont Avenue N., Suite 414
Seattle, WA 98103
206.545.0346 (direct line)
206.545.0350 (fax)
E-mail: kipling@kiplinglawgroup.com

Counsel for Requester Grisoft, s.r.o.

Of Counsel:

MICHAEL L. MEEKS
Pepper Hamilton LLP
5 Park Plaza, Suite 1700
Irvine, CA 92614-8503
Voice: (949) 567-3509
Fax: (949) 863-0151

EXHIBIT A

Excerpt of Copyright Code, 17 U.S.C. § 512(h)

Subpoena To Identify Infringer.—

(1) Request.— A copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.

(2) Contents of request.— The request may be made by filing with the clerk—

(A) a copy of a notification described in subsection (c)(3)(A);

(B) a proposed subpoena; and

(C) a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.

(3) Contents of subpoena.— The subpoena shall authorize and order the service provider receiving the notification and the subpoena to expeditiously disclose to the copyright owner or person authorized by the copyright owner information sufficient to identify the alleged infringer of the material described in the notification to the extent such information is available to the service provider.

(4) Basis for granting subpoena.— If the notification filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider.

(5) Actions of service provider receiving subpoena.— Upon receipt of the issued subpoena, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A), the service provider shall expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification.

(6) Rules applicable to subpoena.— Unless otherwise provided by this section or by applicable rules of the court, the procedure for issuance and delivery of the subpoena, and the remedies for noncompliance with the subpoena, shall be governed to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena duces tecum.

EXHIBIT B

Pepper Hamilton LLP
Attorneys at Law

3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103-2799
215.981.4000
Fax 215.981.4750

Julia C. Mattis
direct dial: 215.981.4339
direct fax: 215.359.1938
mattisj@pepperlaw.com

December 6, 2007

Via Facsimile ((425) 936-7329)
and First Class Mail

J. K. Weston
DMCA Designated Agent
Microsoft Corporation; The Microsoft Network,
LLC; MSNBC Interactive News, LLC; MSBET,
LLC; LinkExchange, Inc.; WebTV Networks, Inc.
One Microsoft Way
Redmond, WA 98052

Re: Website: www.avg-soft.com
Notice of Copyright and Trademark Infringement

Dear Sir or Madam:

We are counsel for Grisoft, Inc. ("Grisoft"), which is a leading developer of software solutions targeted at protecting against Web-borne computer viruses.

We are writing regarding the website, www.avg-soft.com (the "Website"). The Website appears as a highly prominent, if not the first, Sponsored Link, when the query "AVG" is entered into MSN's search engine. Enclosed is a copy of a printout of the page from a query of MSN's site, done today, showing the Website in second position. The Website actively infringes Grisoft's copyrights and, coincidentally our client's trademarks by, *inter alia*, (1) distributing, without authorization, imperfect copies of Grisoft's AVG, registered copyright-protected, software, together with illegitimate, and inoperable, license key codes and (2) confusing the public into believing that there is identity, or some sort of affiliation, between the proponent of the Websites and Grisoft. On information and belief, the Websites also provide screenshots of Grisoft's proprietary software.

Grisoft owns all the copyrights (and trade secrets) and associated trademarks, in the computer programs which it distributes in the marketplace. These copyrights are valid and subsisting and have not been licensed for use, reproduction or distribution of any kind whatsoever to the proponent of the Website, which we are challenging via this letter.

Moreover, Grisoft and its affiliates are variously the owners of numerous trademark registrations for the term, "AVG," (the "Mark") including U.S. Registration No. 3,122,712, on the Mark, covering the goods and services set forth in the enclosed Appendix; CTM Registration No. 3893716, on the Mark; Czech Republic Registration No. 196208, on the Mark; Czech Republic Registration No. 195288, on the Mark and Design; Slovak Republic Registration No. 210618, on the Mark. The applicant for the United States registrations is our client's related company, Grisoft s.r.o. Co., Czech Republic, Lidicka 31 (c p 965) Brno Czech Republic 60200.

Grisoft's anti-virus software is a product of original authorship resulting from many years of programmer development effort and substantial expenditures of money. Likewise, Grisoft has invested considerable time, money and effort into advertising and promoting its products and related services under the AVG mark, both domestically and internationally. As a result, consumers have come to expect authentic, fully functioning products and services, in association with these marks.

The Website targeted for take-down in this letter has no rights in Grisoft's copyrights or in its trademarks and service marks. Nonetheless, the Website's proponent, with MSN's facilitation, is taking a "free ride" on our client's rights. On information and belief, the proponent of the Website is distributing -- for a fee -- Grisoft's AVG proprietary software. Further, the Website confuses the public into believing that there is a sponsorship or affiliation between the Website and Grisoft, much to the detriment of Grisoft's business and in blatant infringement of Grisoft's intellectual property rights.

Accordingly, pursuant to the U.S. Digital Millennium Copyright Act ("DMCA"), this letter serves as formal notice of infringement in the event of legal proceedings. I refer you to 17 U.S.C. § 512(c) of the DMCA which provides that a service provider may be protected from liability in copyright if, upon notification of claimed infringement, the service provider "responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity."

We hereby represent in good faith that Grisoft has never given permission or consent to any agent or representative of the owner or content-provider of the Website to offer copies of Grisoft's products and services or to give the appearance of doing so with the authority of Grisoft. We further make the good faith representation that the use of Grisoft's copyrighted and trademarked material on the Website is not otherwise permitted by law. Rather, our client

Pepper Hamilton LLP
Attorneys at Law

believes that such illegal exploitation of Grisoft's copyrights and trademarks has been done "willfully and intentionally," within the meaning of the U.S. Copyright Law and in bad faith.

Grisoft has directed us to demand that you, as sponsoring link and other service provider to the Website, immediately remove all of its Sponsored Link postings from the MSN search engine and remove or disable all Internet access to the Website through the MSN search engine. This demand is made in compliance with the provisions of the DMCA, 17 U.S.C. § 512(c).

In addition, please be advised that we will be seeking on behalf of Grisoft, in a federal district court of requisite jurisdiction, a subpoena *duces tecum* directed to MSN, seeking the identity of the proponent of the Website. This subpoena shall conform to the requirements of the DMCA, 17 U.S.C. § 512(h). Please let me know whether MSN would be willing to accept service of such subpoena, without the necessity of our employing a process server.

May I kindly request that you provide me with assurance that you have complied with this demand to remove and disable, and a response concerning acceptance of the subpoena, before ***Thursday, December 13, 2007.***

Under penalty of perjury, I aver that all of the information in this notice is accurate and that I am authorized so to act on behalf of Grisoft. Further, on behalf of Grisoft, I expressly reserve all of its rights, claims, actions, assertions and remedies, in law and equity, not only against the owner and content provider of the offending website, but also against your company and anyone associated with your company unless and until this matter can be resolved to Grisoft's satisfaction.

Sincerely,

Julia Mattis

Julia C. Mattis

JCA

Enclosures

APPENDIX

Goods and Services Coverage of
U.S. Trademark Registration No. 3,122,712
on "AVG"

International Class ("IC") 9: Computer software and programs for security protection, including anti-virus protection, in the field of computers; electronic, magnetic and optical media, namely, CDs and DVDs containing information for security and anti-virus protection; downloadable electronic magazines in the field of computers; downloadable electronic publications, namely magazines in the field of security and anti-virus protection in the field of computers; multi-media software recorded on CD-ROMs featuring information on security and anti-virus protection; personal computers and portable personal computers and parts, complements and accessories therefor, namely computer peripherals.

IC 42: Development of software programs; consultancy services in the field of software and hardware, installations, updating, lease, copying, renewal and restoration of computer software, regeneration of computer data and software, computer system analysis, transfer of data or documents from physical media to electronic media, conversions of computer data and programs, leasing of computers and consultancy in the field of computer hardware; maintenance of computer software.

IC 37: Maintenance and repair of computer hardware.

Web results 1-10 of 25,900,000

See also: Images, Video, News, Maps, MSN, More ▼

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See your message here...

EXHIBIT C

AO88 (Rev. 12/06) Subpoena in a Civil Case

Issued by the

UNITED STATES DISTRICT COURT

Western DISTRICT OF Washington

Grisoft, s.r.o.

V.

Microsoft Corporation, et al.

SUBPOENA IN A CIVIL CASE

Case Number:[1]

TO: J.K. Weston, DMCA Designated Agent
Microsoft Corporation; The Microsoft Network LLC
One Microsoft Way
Redmond, WA 98052

☐ YOU ARE COMMANDED to appear in the United States District court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☑ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

See Attachment A

PLACE	DATE AND TIME
Pepper Hamilton LLP 5 Park Plaza, Suite 1700, Irvine, CA 92614-8503	12/26/2007 3:00 pm

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Clerk's Office
U.S. Courthouse, 700 Stewart Street, Lobby Level, Seattle, WA 98101

(See Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), on next page)

[1] If action is pending in district other than district of issuance, state district under case number.

PROOF OF SERVICE

	DATE	PLACE
SERVED		

SERVED ON (PRINT NAME)	MANNER OF SERVICE

SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on ______________________
DATE

____
SIGNATURE OF SERVER

____
ADDRESS OF SERVER

____

Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), as amended on December 1, 2006:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises — or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) (A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) (A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(e) CONTEMPT. Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

ATTACHMENT A

DEFINITIONS

1. The use of the singular includes the plural and vice versa; and the use of the masculine includes the feminine and *vice versa.*

2. "And" and "or" shall be used interchangeably to include both the disjunctive and the conjunctive.

3. All verbs shall include all tenses.

4. "You" or "your" means the Microsoft Corporation, the Microsoft Network, LLC, MSNBC Interactive News, LLC, MSBET, LLC, Link Exchange, Inc., and WebTV Networks, Inc., your predecessors, successors, all past and current directors, officers, agents, employees, representatives, servants, consultants, investigators, and any person (as defined herein) who acted or purported to act, or who is acting or purporting to act, for the Microsoft Corporation, the Microsoft Network, LLC, MSNBC Interactive News, LLC, MSBET, LLC, Link Exchange, Inc., and WebTV Networks, Inc., or on your behalf, including your attorneys and their agents, employees, representatives, servants, consultants, investigators, or anyone acting for them or on their behalf in connection with this litigation.

5. "All facts" or "any facts" means each and every event, act, omission, incident, condition, or circumstance related to the subject matter of the Request where used (collectively "the event"), including the dates of the event, the identification of all persons who witnessed the event, and the identification of all persons who, although not a witness to the event, have personal knowledge of the event or some aspect of the event.

6. "Document" or "documents" shall have the same meaning as in Rule 34 of the Federal Rules of Civil Procedure and shall mean and include, without limitation, the original, any draft, any revision and each non-identical copy of any writings, drawings, graphs, charts, photographs, phono-records, recordings, videotape, CD, DVD, microfilm, film, data processing files, and any other computer readable files, programs, utilities or other data compilations from which information can be obtained, translated, or transcribed, if necessary, by the requesting party through detection devices into reasonably usable form, including, without limitation, correspondence, memoranda, notes, scraps of paper, diaries, calendars, reports, telegrams, TWX's, telephone logs, e-mail, vouchers, invoices, journals, bills, orders, time slips or records, receipts, summaries, pamphlets, books, contracts, statistics, minutes, studies, tests and test reports, returns, computations, logs, financial records or statements, checks, bank statements, medical records, X-rays, laboratory reports or orders, otherwise memorialized or communicated matter, whether typed, printed, photocopied, filmed, microfilmed, or recorded in any manner, from whatever source received, in your possession or contract.

7. "Communication" or "communications" shall mean, including, but not limited to, correspondence, memoranda, notes, transmittals, or other written material.

8. "Person" or "persons" shall mean any or all entities, including without limitation, individuals, associations, corporations, including their affiliates, parents or subsidiaries, companies, partnerships, joint ventures, sole proprietorships, firms, trust, estates, agencies or governmental entities.

9. "Proponent" means the proponent of the sponsored website "avg-soft.com."

10. "Related to," "relating to," or "relates to" means supporting, connected with, regarding, constituting, containing, discussing, concerning, referring to, evidencing, or in any way pertaining to the subject matter of the Request where used.

INSTRUCTIONS

1. When the identification of a person is requested:

a. if the person is an individual, please state the person's full name, the name of the person's employer or business affiliation, the person's job title, the person's business address and business telephone number, any business relationship between you and the person, and the dates, if any, of any commencement or termination of the person's employment or other association with you; and

b. if the person is not an individual, please state the person's full name, current address, a description of the entity, whether a corporation, general partnership, limited partnership or some other form, the identity of the individual who has the highest title or position of authority within the entity, and any past or present business relationships between you and the entity.

2. "Identify," when used with respect to a document, means to state (a) the type of document (e.g., letter, memorandum, handwritten note), (b) its title, and name or number, if any, (c) its date, (d) its author and addressee, (e) its last known custodian or location, (f) a brief description pf its subject matter, and (g) its size, length, or number of pages, as appropriate.

3. "Identify," when referring to any act, means to state (a) the substance of the event or events constituting each act, (b) the location of each act, (c) the date of each act, (d) the

identity of all persons involved in each act, and (d) the identity of any documents arising from, reflecting, recording or relating to each act.

4. "Identify," when referring to any oral communication means to state (a) the date of the communication, (b) the type of communication (e.g., phone conversation, face-to-face meeting, etc.), (c) the identity of the person initiating the communication, (d) the identity of the person or persons to whom the communication was directed, (e) the identity of all other persons who were present when the communication was made or who heard the communication, (f) the subject matter of the communication, and (g) the identity of any documents arising from, reflecting, recording, or relating to the communication.

5. Each Request seeks all responsive information in your possession, custody, or control.

6. If you object, in whole or in part, to the production of any requested document, on the ground that information contained in the document is privileged or otherwise not discoverable, identify each such document or thing in accordance with Paragraph 2 above, and, for each such identified document or thing, state the privilege claimed or the grounds for objection, identify each person other than the addressee who received or was shown a copy of the document or thing, identify all acts and persons referred to in the document or thing, and describe all facts upon you base the assertion of the privilege or grounds for objection.

7. If any responsive document or thing is no longer in existence, cannot be located, or is not in your possession, custody or control, identify each such document or thing in accordance with Paragraph 2 above, and, for each such identified document or thing, identify its date, its subject matter, the name, home address, home telephone number, employer, employer's

address, and business telephone number of each person who prepared it, each person who received an original or copy of the document or thing, each person who was shown an original or copy of the document or thing, each person who has, or may have had, past or present possession of the document or thing, or who has, or may have, knowledge or information relating to the document or thing, and the reason the document or thing is no longer in existence or in your possession, custody, or control.

DOCUMENTS TO BE PRODUCED

1. Any and all documents identifying the proponent of the sponsored website avg-soft.com.

2. Identify any and all facts related to the Proponent of the "avg-soft.com" website, including name, company name, mailing address, e-mail address, phone number and produce all documents or correspondence evidencing such information.

3. Any and all documents or correspondece, pertaining to the Proponent's application and subsequent enrollment in the sponsored advertising program, including, but not limited to, date applied, date enrolled, key terms chosen in connection with the sponsored advertising, any other domains the Proponent is currently advertising through your sponsored advertising program, and all other documentation in connection with the Proponent's Microsoft sponsored advertising program.

EXHIBIT D

DECLARATION

I hereby declare, pursuant to 17 U.S.C. 512(h)(2)(C), that the purpose for which this subpoena is sought is to obtain the identity of an alleged infringer and such information will only be used for the purpose of protecting rights under this title.

Michael E. Kipling